

Judicial Review to Correct Arbitral Error—An Option to Consider

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I. INTRODUCTION

One cannot discuss the subject of judicial review to correct arbitral error without first looking at the assumptions underlying the purpose of such review. Unless the arbitrators are under a duty to at least try to decide disputes correctly on the basis of applicable law and explain the rationale of their award, there would be no purpose for judicial review beyond the narrow statutory grounds set forth in Section 10(a) of the Federal Arbitration Act (FAA).¹

Commercial arbitration in the United States had its inception in certain industries (e.g., textiles and construction) where the parties wanted industry people rather than lawyers to decide their disputes, primarily on the basis of customary practices in their industry rather than legal principles. The parties preferred this business rather than legal approach because the disputes usually involved factual rather than legal issues (e.g., whether the goods were defective or whether the work conformed to the plans and specifications). That is undoubtedly the reason that the Commercial

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¹ The four statutory grounds for vacating an arbitral award enumerated in Section 10(a) of the FAA, which are substantially the same as the grounds set forth in Section 12(a) of the Uniform Arbitration Act, are (1) the procurement of the award by corruption, fraud or undue means; (2) evident partiality or corruption in the arbitrators, or either of them; (3) refusal to hear pertinent and material evidence or to postpone the hearing upon sufficient cause or other prejudicial misconduct of the arbitrators and (4) where the arbitrators have exceeded their powers. *See* Federal Arbitration Act, 9 U.S.C. § 10(a) (1994); UNIF. ARBITRATION ACT § 12(a), 7 U.L.A. 280 (1997).

Arbitration Rules of the American Arbitration Association (AAA) did not require arbitrators to even attempt to follow applicable law in rendering their awards. In fact, Rule 43 of the AAA's Commercial Arbitration Rules expressly provides that arbitrators can grant "any remedy or relief that the arbitrator deems just and equitable."²

As arbitration became an acceptable method of dispute resolution in the broader commercial arena and as disputes began to involve more complex legal issues, many parties to commercial agreements were unwilling to agree to arbitration pursuant to the AAA's standard pre-dispute arbitration clause and its Commercial Arbitration Rules. Their lawyers advised them that it was too risky to agree to arbitrate under rules which permitted the arbitrators to decide their disputes on the basis of the arbitrators' subjective notions of fairness, justice and equity rather than on the basis of the predictable rules of law under which most businesses operate. Thus, many business people avoid what is sometimes referred to as "roll-the-dice" or "Russian roulette" arbitration.³

The efficiency, speed and finality of arbitration offer distinct advantages over traditional litigation. However, because of the uncertainties inherent in AAA arbitration and the lack of an effective means of judicial review to correct arbitral error, there are many who avoid using AAA pre-dispute arbitration clauses in their agreements because they have no confidence that the arbitrators' decision will be as objective, predictable and correct as one would expect if the decision were made by a highly respected judge sitting without a jury.

Another reason business people are dissatisfied with traditional arbitration pursuant to the AAA's Commercial Arbitration Rules is the AAA's policy of discouraging their arbitrators from explaining the reasons for their awards. Although the AAA Commercial Arbitration Rules neither require nor prohibit reasoned awards, the AAA's Guide for Commercial Arbitrators clearly discourages them, stating that "written opinions might open avenues for attack on the award by the losing party."⁴ In fact, at least

² COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION RULE 43 (1996).

³ See Abraham Fuchsberg, *The Arbitrariness of Arbitrators*, N.Y. L.J., July 21, 1992, at 2.

⁴ AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS 24 (1991); see also ROBERT COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 30 (5th ed. 1993) ("Written opinions can be dangerous because they identify targets for the losing party to attack.").

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in the New York region, the AAA has stricken from its panel of commercial arbitrators certain lawyer-arbitrators who, as a matter of conscience, insist on explaining their arbitral awards, even where the explanation may consist of no more than a short statement of the arbitrator's findings relating to the critical issues in the dispute. Undoubtedly, there are many well-qualified AAA arbitrators who would like to explain their arbitration awards so that the losing party will at least understand that the award was rendered impartially and is supported by logical reasoning. However, several of these arbitrators have stated to this author privately that they are afraid to do so for fear that they will also be "excommunicated" by the AAA.

Many parties believe that the process of explaining the reasons and legal basis for an arbitral award serves as a useful discipline for those arbitrators who place a premium on making legally correct and rational decisions.⁵ Such an explanation also reduces the risk that the arbitrators will play Solomon by "splitting the baby" or decide the dispute on a subjective basis. The more understandable the award, the more likely it is to be respected, even by the losing party. Without such an explanation, the arbitration process may appear to be an arbitrary process, where the arbitrators are free to decide disputes on the basis of their own prejudices. It has been said that legal uncertainty breeds litigation. Because of the uncertainty inherent in AAA arbitration conducted pursuant to the AAA's standard pre-dispute arbitration clause and its Commercial Arbitration Rules, most sophisticated parties to commercial agreements will continue to avoid arbitration as a means for resolving their disputes pursuant to these rules.⁶ Despite the costs and delays inherent in litigation, many parties will continue to prefer litigation as the lesser evil, because trial courts are required to at least attempt to decide disputes correctly on the basis of applicable law, and if the trial courts get it wrong, there is an appellate court that can fix the error.

Once the bridge of a reasoned award is crossed, the issue of the pros and cons of substantive appellate review can be addressed. Obviously, there cannot be meaningful appellate review of an unexplained arbitral award.

⁵ For an excellent discussion of the pros and cons of requiring written opinions to explain arbitral awards, see Lynn Katzler, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U. L. REV. 152 (1995).

⁶ See Stephen A. Hochman, *A Bar Association-Sponsored Forum for Arbitration Is Needed*, N.Y. L.J., Oct. 22, 1992, at 1.

II. REASONED AWARDS WITHOUT SUBSTANTIVE JUDICIAL REVIEW

One of the reasons many parties choose arbitration over litigation is the finality of the arbitral award.⁷ Even though a trial court may be more likely to deliver a legally correct result, and an appellate procedure exists to correct its mistakes, some parties have concluded that the higher quality of the judicial system comes at too high a price in terms of delay and expense. However, some have attempted to get the best of both worlds—a correct result without sacrificing the benefit of the finality of arbitration—by providing in their pre-dispute arbitration clause that the arbitrators must be highly qualified lawyer-arbitrators who are committed to deciding all disputes on the basis of applicable law and setting forth the reasons for their award.

Paragraph one of Appendix A to this Article contains a relatively abbreviated example of such a “best-of-both-worlds” alternative to the AAA’s standard pre-dispute arbitration clause for those who would like legally correct arbitral awards but are not willing to subject the award to substantive judicial review.⁸ This alternative provision requires the arbitrators to be experienced lawyers, permits each party to strike any or all of the AAA’s nominees for arbitrators on a peremptory basis, requires the arbitrators to endeavor to follow applicable law and judicial precedent and requires that arbitrators set forth the findings and conclusions upon which their award is based. In order to counter the argument that inserting a provision requiring arbitrators to follow the law and explain their awards will enlarge the scope of judicial review, this alternative clause expressly provides that the award is final and binding on all parties and shall not be vacated or modified by any court (for errors of law or otherwise) except upon the limited grounds provided by statute. The purpose of this last provision is to discourage the losing party from attempting to overturn the arbitral award on *any* ground other than the statutory ones.⁹

⁷ For an excellent discussion of the pros and cons of permitting judicial review of arbitral awards, see Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988).

⁸ For other (and more extensive) examples of pre-dispute arbitration clauses, including alternative methods of arbitrator selection, see Stephen A. Hochman, *Model Dispute Resolution Provisions for Use in Commercial Agreements Between Parties with Equal Bargaining Power*, in 1 ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE 189 (1994).

⁹ Of course, there can be no assurance that a court will not vacate an arbitral award

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A contractual provision requiring the arbitrators to endeavor to follow applicable law and explain their awards without expanding the statutory grounds for judicial review may satisfy those who put a higher premium on the finality of the arbitration award than they do on the risk that the arbitrator will commit legal error. However, even if the parties could be confident that every arbitrator would be at least as competent as the average trial judge to correctly decide the dispute, some parties will not buy into arbitration without the safety net of some degree of substantive judicial review. Before addressing the various levels of substantive judicial review, it may be useful to look at the cases that have addressed the issue of whether courts will expand the statutory grounds for judicial review of arbitral awards merely because the parties have agreed that they should make this expansion.¹⁰

on the ground that it violates a “strong public policy” or is “completely irrational” despite a contractual provision limiting the scope of review to the statutory grounds, possibly by finding that the award exceeds the powers of the arbitrators, which is the fourth statutory ground set forth in Section 10(a) of the FAA. *See* 9 U.S.C. § 10(a). For example, in *Lindenstadt v. Staff Builders, Inc.*, 64 Cal. Rptr. 2d 484, 491 (Cal. Ct. App. 1997), the court held that the trial court should review de novo the issue of whether the arbitrator’s award was based on an illegal contract (in this case a contract to pay a commission to an unlicensed person for services as a real estate broker) since an award based on an illegal contract would violate public policy and thus exceed the arbitrator’s powers. However, in *Des Tombe v. Kidder Peabody & Co.*, 8 Sec. Arb. Commentator 21–22 (Cal. Ct. App. 1996), the court, in rejecting the “completely irrational” standard for vacating an erroneous arbitral award, held that as long as the arbitrators have the power and authority to decide a particular issue, their decision cannot exceed their powers within the meaning of the statute. *See id.*

¹⁰ It is interesting to note that a study committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL), which was appointed to consider revisions to the Uniform Arbitration Act, recommended that its drafting committee consider adding a statutory provision to make it clear that parties can, by their agreement, permit appeals to the courts to correct arbitral errors of law. However, the NCCUSL Study Committee, recognizing the importance of finality in arbitration, specifically declined to recommend changing Section 12 of the Uniform Arbitration Act to provide for “statute mandated judicial review of awards concerning errors of fact and/or law.” NCCUSL Study Committee Report, Recommendation No. 2 (1995).

III. ENFORCEABILITY OF AGREEMENTS FOR EXPANDED JUDICIAL REVIEW

In *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*,¹¹ the parties provided in their arbitration clause that the court "shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and (2) whether as a matter of law based on such findings of fact the award should be affirmed, modified or vacated."¹² The U.S. District Court for the Southern District of New York, after reviewing the award in accordance with the agreement of the parties, modified the award to correct an arbitral error.¹³ The court held that because it had subject matter jurisdiction to act as a trial court and determine all issues if the parties had not agreed to arbitration, there was no public policy reason not to make the more limited judicial determination which the parties provided for in their arbitration clause.¹⁴ The court noted that the parties may not have agreed to submit their dispute to arbitration without such a broad provision for judicial review.¹⁵

Similarly, in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,¹⁶ the Fifth Circuit Court of Appeals upheld an arbitration clause which provided that the arbitration award "shall be final and binding on both parties, *except that errors of law shall be subject to appeal.*"¹⁷ The court cited *Mastrobuono v. Shearson Lehman Hutton, Inc.*¹⁸ for the proposition that, where the parties contractually agree to permit expanded review of the arbitration award, the FAA requires that the court enforce the arbitration agreement in accordance with its terms.¹⁹ Although the district court reviewed the arbitral award, it did so under the "harmless error" standard and accordingly confirmed the award.²⁰ The Fifth Circuit reversed the district court and reviewed the arbitral award de novo for errors of law

¹¹ 584 F. Supp. 240 (S.D.N.Y. 1984).

¹² *Id.* at 242.

¹³ *See id.* at 245-246.

¹⁴ *See id.* at 244.

¹⁵ *See id.*

¹⁶ 64 F.3d 993 (5th Cir. 1995).

¹⁷ *Id.* at 996 (emphasis in original).

¹⁸ 514 U.S. 52 (1995).

¹⁹ *See Gateway Technologies*, 64 F.3d at 996 (5th Cir. 1995).

²⁰ *See id.* at 997.

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because the parties undoubtedly intended the court to follow the same standard as would be applied by an appellate court reviewing the actions of a lower court.²¹

In *LaPine Technology Corp. v. Kyocera Corp.*²² the U.S. District Court for the Northern District of California, on facts substantially the same as those in *Fils et Cables D'Acier de Lens*, refused to review the entire record of the arbitration proceeding to determine whether the findings of the arbitrators were supported by substantial evidence. The court stated that, although a court may have subject matter jurisdiction over the claim submitted to arbitration, "its power to adjudicate . . . cannot be changed or altered by the agreement of the parties"²³ The court declined to follow *Fils et Cables D'Acier de Lens* and distinguished *Gateway Technologies*, where the agreement merely provided for judicial review to correct errors of law, by emphasizing that the agreement in *LaPine Technology* required the court to review the award not only to correct errors of law, but to determine whether the arbitrators' findings of fact were supported by substantial evidence.²⁴

The holding in *LaPine Technology* seems an aberration, and most commentators (including this author) believe that it will be reversed by the Ninth Circuit Court of Appeals, where it is presently on appeal. Because arbitration is a creature of contract and the policy of the FAA is to favor arbitration, *Fils et Cables D'Acier de Lens* seems more consistent with such policy than *LaPine Technology*.²⁵

Assuming the courts will honor a pre-dispute arbitration agreement which expands the statutory grounds for judicial review, the question is whether it is a good idea for the parties to opt for judicial review, and if so, by what standard.

²¹ See *id.*

²² 909 F. Supp. 697, 706 (N.D. Cal. 1995).

²³ *Id.* at 703.

²⁴ See *id.* at 702, 704–705. For an analysis of *Fils et Cables D'Acier de Lens*, *Gateway Technologies* and *LaPine Technology*, see Robert A. Holtzman, *Arbitrary Decisions—Are Arbitral Decisions that Ignore the Law Subject to Judicial Review?*, L.A. LAW., Oct. 1996, at 50.

²⁵ However, see Richard Chernick, *Clause Celebre: Enhancing, Not Inhibiting, Enforcement*, L.A. DAILY J., June 26, 1996, at 7 (pointing out the disadvantages of providing for judicial review of factual as well as legal arbitral findings).

IV. THE VARIOUS LEVELS OF EXPANDED JUDICIAL REVIEW

One of the problems with the present state of arbitration law is the confusing array of nonstatutory grounds for judicial review of arbitral awards. Despite the fact that Section 10(a) of the FAA specifies only four narrow grounds for vacating arbitration awards,²⁶ none of which permit judicial review of the substance or merits of the award, most state, as well as federal, courts have been willing to scrutinize the merits of an arbitral award to determine whether it is (1) in "manifest disregard" of the law, (2) in conflict with a strong "public policy," (3) "arbitrary and capricious" or "completely irrational" or (4) fails to "draw its essence" from the parties' underlying contract.²⁷ The Fourth Circuit Court of Appeals is the only circuit to have clearly rejected the nonstatutory grounds for vacatur, stating that "Congress has limited the grounds upon which an arbitral award can be vacated . . . [to the four grounds set forth in Section 10(a) of the FAA, which] do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached."²⁸ Despite the fact that many other circuit courts of appeals pay lip service to the statutory grounds being the only grounds for vacatur, they nevertheless explain why the arbitral error in the case before it is a "garden variety" error of law rather than the more flagrant or egregious error which is arguably subject to vacatur.

The result of these vague and confusing judicially created standards for review is that the losers in arbitration often attempt to overturn the award on one of these imprecise grounds; such attempts are almost always futile. Thus, rather than getting arbitration instead of litigation, the parties end up with arbitration *and* litigation.

The notion of providing for judicial review to correct errors of law has gained support from judges as well as legislators. Judge Joyce Kennard of the California Supreme Court, who wrote the dissenting opinion in *Moncharsh v. Hailly & Blaise*,²⁹ has been one of the more articulate

²⁶ See 9 U.S.C. § 10(a).

²⁷ For an excellent scholarly and comprehensive analysis of these nonstatutory grounds for arbitral review, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739 (1996).

²⁸ *Remmey v. Paine Webber Inc.*, 32 F.3d 143, 146 (4th Cir. 1994).

²⁹ 832 P.2d 899, 919 (Cal. 1992) (en banc) (Kennard, J., dissenting). The majority opinion in *Moncharsh* held that an arbitrator's decision is not reviewable even for errors

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proponents of permitting judicial review of arbitral awards under certain limited circumstances. In her speech to the Uniform Arbitration Act Symposium of the Section of Litigation of the American Bar Association held in Washington, D.C., on April 19, 1997, Judge Kennard pointed out that “the question of judicial review of arbitration awards does not present an all-or-nothing choice between, on the one hand, no judicial review and, on the other hand, a right to full-scale, *de novo* judicial review at both the trial and appellate court levels.”³⁰

Judge Kennard suggested an intermediate position that, even in the absence of an agreement by the parties to allow substantive judicial review, awards which are “manifestly erroneous” and cause a “substantial injustice” should be subject to vacation by a court.³¹ In support of her position, Judge Kennard quoted from a 1982 decision of the Michigan Supreme Court, stating:

The Michigan judiciary is not a procedural pass-through bureaucracy which may, by agreement of private disputants, be used to validate patently erroneous arbitration awards as a trade-off for docket relief and speedy, inexpensive, and unreviewable dispute resolution. We cannot give parties the use, and benefit, and authority of the state’s judicial process which exists *solely* to interpret and apply the law by giving effect to an agreement to ignore the law.³²

Another example of the type of limited judicial review advocated by Judge Kennard can be found in a recently proposed California statute.³³ This bill would provide for limited substantive appellate review of arbitration awards, but only if the contract is with a consumer party (i.e., a party who does not have equal bargaining power) and is a standardized contract drafted by or on behalf of the nonconsumer party.³⁴ A “consumer party” is defined in the bill to include (but not be limited to) employees,

of fact or law which cause substantial injustice and appear on the face of the award. *See id.* at 900.

³⁰ Judge Joyce Kennard, Speech to the Section of Litigation of the American Bar Association (Apr. 19, 1997) (on file with author) [hereinafter Speech by Judge Kennard].

³¹ *Id.*

³² *Detroit Auto. Inter-Ins. Exch. v. Gavin*, 331 N.W.2d 418, 430 (Mich. 1982) (emphasis in original).

³³ SB 19, 1997–1998 Regular Session (amended April 17, 1997).

³⁴ *See id.* § 3(a)(2).

purchasers of goods or services primarily for personal, family or household purposes, persons with medical malpractice claims and individuals covered by health care plans.³⁵ In such cases, the bill would require the arbitrator to include written findings of fact and conclusions of law and would give the consumer party (but not the nonconsumer party) the right to vacate the award if it "is the result of legal error by the arbitrator that has resulted in a miscarriage of justice."³⁶

The scope of judicial review suggested in California Bill No. SB 19 would be limited to correcting legal errors by the arbitrator that have resulted in a miscarriage of justice, whereas Judge Kennard suggests that judicial review be limited to arbitral errors which are *manifestly* erroneous and cause *substantial* injustice.³⁷ However, these vague standards may encourage all those who believe that they lost in arbitration due to legal error to claim that the legal error in their case was manifestly erroneous or resulted in a substantial injustice, whereas the defender of the arbitral award would undoubtedly argue that even if the arbitrator was wrong on the law, the error did not rise to the level of a substantial injustice or a miscarriage of justice.

A similar uncertainty in the standard for the judicial review of arbitral awards exists in the recently enacted British Arbitration Act of 1996.³⁸ Section 69 of the Act provides that, unless the parties have agreed to dispense with written reasons for the arbitration tribunal's award, the court may vacate or modify the award if it finds that "the decision of the tribunal is *obviously* wrong" or the legal issue involved is "one of general importance and the decision of the tribunal is at least open to *serious* doubt."³⁹

Neither Judge Kennard's recommendation for limited judicial review nor the provisions for limited judicial review contained in California Bill No. SB 19 and Section 69 of the British Arbitration Act would authorize

³⁵ See *id.* § 3(b).

³⁶ Section 1286.5(a) of the California Code of Civil Procedure as proposed to be added by SB 19. It is interesting to note that in the March 31, 1997 draft of SB 19, the court could vacate the arbitral award only if it is manifestly erroneous and results in substantial injustice. The April 17, 1997 amendment changed the standard to "legal error" which results in a "miscarriage of justice." See *id.* § 3(a)(1).

³⁷ See Speech by Judge Kennard, *supra* note 30, at 2.

³⁸ Arbitration Act, 1996, ch. 23 (Eng.) (effective January 1, 1997).

³⁹ Arbitration Act, 1996, §§ 69(1), 69(3)(c) (Eng.) (emphasis added.). See Ronald M. Sturtz, *Debate Heats Up Over Judicial Review of Arbitration Results*, N.J. L.J., Aug. 12, 1996, at S-7 (discussing Section 69).

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the court to apply the same broad standard of review to correct arbitral errors of law as an appellate court would have to correct errors of law committed by a trial judge.⁴⁰ Undoubtedly, the reason these proposals and provisions limit the scope of judicial review rather than provide for the full scope of judicial review to correct legal error as applied in the *Gateway Technologies* case is that, unlike in *Gateway Technologies*, such limited scope of review would be imposed by statute rather than voluntarily agreed to by the parties. Imposing a right to substantive judicial review by statute rather than leaving it to the parties to choose it by contract is inconsistent with the concept of finality, which is one of the important reasons why some parties agree to arbitration. Another reason that those seeking to impose substantive judicial review by statute may be reluctant to suggest full judicial review to correct legal error is the concern that a statutory (as opposed to a contractual) enlargement of the scope of judicial review might be too radical a departure from the statutory norm. It also might be deemed inconsistent with the arbitration policy embodied in the FAA, because full judicial review to correct all arbitral legal errors might discourage those who consider finality an essential element of arbitration to refrain from agreeing to arbitration. However, this concern should be alleviated if the statute granting the right to substantive judicial review could be negated by the agreement of the parties, as is the case under the British Arbitration Act.⁴¹ With the possible exception of arbitration agreements imposed on consumers and others in an adhesion context, substantive judicial review of arbitral awards should best be left as an option for the parties to consider at the time they are entering into their arbitration agreement rather than be imposed by statute.

The possibility of a contractual agreement for an appellate arbitration mechanism to review arbitral awards limited to correcting errors of law was noted in a recent scholarly article by Professors Stephen Hayford and Ralph Peeples in which the authors stated:

Undoubtedly, it is the absence of a substantive guarantee of accurate and correct results that causes many experienced litigators to be reluctant to embrace commercial arbitration as an acceptable alternative to traditional litigation. That fact prompts speculation as to the feasibility of

⁴⁰ See generally SB 19, 1997–1998 Regular Session (amended April 17, 1997); see also Arbitration Act, 1996, § 69 (Eng.); Speech by Judge Kennard, *supra* note 30.

⁴¹ See Arbitration Act, 1996, § 69(1) (Eng.) (permitting the parties to opt out of substantive judicial review merely by agreeing to waive the statutory provision requiring the arbitrators to give written reasons for their awards).

the parties to a given dispute agreeing contractually, at the outset of the arbitration proceeding, to some form of appellate arbitration mechanism that would provide a check on the otherwise unreviewable nature of the commercial arbitration award. As incongruous as such a proposition may seem to those who praise the relative simplicity and expediency of arbitration, the Authors maintain it merits consideration.⁴²

Professors Hayford and Peeples also noted that the scope of review should be "limited to questions of law and application of law to fact decided by the original tribunal."⁴³ Even though Professors Hayford and Peeples suggest that arbitration awards be reviewed by an arbitral panel rather than a court, they wisely do not attempt to limit the scope of review to manifest or substantial legal error. An example of contractual provisions for substantive review of the arbitral award by an appellate arbitration panel can be found in paragraph 1 of Appendix B to this Article.

In *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.*,⁴⁴ the Supreme Court of New Jersey articulated the solution for those who have a problem accepting as final the kind of grossly erroneous arbitral award rendered by the arbitrators in that case, which has been characterized by at least one commentator as a "knucklehead" award.⁴⁵ After stating that arbitration awards are intended to be final and not subject to judicial review absent fraud, corruption or similar wrongdoing on the part of the arbitrators, the court in *Tretina Printing* went on to state:

For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the case of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for *mere errors* of New Jersey law, *substantial errors*, or *gross errors* of New Jersey law *and define therein what they mean by that*.⁴⁶

Paragraph 2 of Appendix A contains an alternative arbitration clause

⁴² Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 405 (1995).

⁴³ *Id.*

⁴⁴ 640 A.2d 788, 793 (N.J. 1994) (per curiam).

⁴⁵ See Sturtz, *supra* note 39, for a discussion of *Tretina Printing* and other cases which involved knucklehead awards which the courts refused to overturn.

⁴⁶ *Tretina Printing*, 640 A.2d at 793 (emphasis added).

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which attempts to do what the *Tretina Printing* court suggested—provide for judicial review to correct errors of law. However, it avoids attempting to limit the review to correcting only gross or substantial errors of law because whether an error of law is a mere error or a substantial or gross error is often in the eyes of the beholder. In addition, it expressly provides that the review should be limited to issues of law and that the court shall accept as final and binding the findings of fact determined by the arbitrator(s).

By avoiding judicial inquiry into factual issues, such as whether the arbitrator's findings of fact were supported by substantial evidence or clearly erroneous, it is hoped that the arbitration proceeding will not be conducted like a judicial trial and that the procedural efficiencies of arbitration will be preserved. Thus, the need for a stenographic record of the arbitral proceedings and the time needed for the court to review the record will be eliminated. Although giving the arbitrator(s) the power to make unreviewable findings of fact may create a potential for abuse by an arbitrator bent on reaching a legally incorrect result, this minimal risk seems to be more than offset by the advantage of a summary judgment type of judicial review limited to correcting errors of law. It also has the benefit of being consistent with the limited provision for judicial review at issue in the *Gateway Technologies* case, which is distinguishable from the broader provision for factual as well as legal review presented in *Fils et Cables D'Acier de Lens* and *LaPine Technology*.

Paragraph 3 of Appendix A contains a provision for the award of costs and attorney's fees against any party who unsuccessfully seeks to stay the arbitration, fails to comply with the arbitration award or is unsuccessful in vacating or modifying the award. This provision covers only the added costs and expenses of the judicial proceeding caused by the defaulting or unsuccessful appellant. Its purpose is to make the party losing in arbitration think twice before forcing the other party to litigate as well as arbitrate. Accordingly, it does not award costs and attorney's fees against the party who won in arbitration but subsequently loses in court as a result of the arbitrator(s) having misapplied the law.

Appendix B to this Article contains various other provisions for arbitral or judicial review of arbitration awards for those who prefer a greater level of review and are willing to pay the price of a more expansive review procedure. Paragraph 1 of Appendix B provides for a right to review by an appellate arbitration panel rather than a court, which is the type of appellate

forum suggested by Professors Hayford and Peebles.⁴⁷ Paragraph 2 of Appendix B provides for full judicial review under the substantial evidence standard for reviewing factual findings (similar to *Fils et Cables D'Acier de Lens* and *LaPine Technology*). Paragraph 3 of Appendix B provides for judicial review limited to correcting errors of law, which is similar to the shorter version set forth in paragraph 2 of Appendix A. Paragraph 4 of Appendix B provides for full judicial review but limits review of the arbitrator's factual findings to the clearly erroneous standard as though the arbitrator was acting as a special master under Rule 53(e) of the Federal Rules of Civil Procedure.⁴⁸ Finally, paragraph 5 contains a cost-shifting provision intended to cause the losing party in arbitration to think twice before seeking judicial review because it requires the appellant to achieve a result which is at least ten percent better than the arbitral award in order to avoid paying the appellee's costs and attorney's fees of the appeal.

V. THE LEVEL OF JUDICIAL REVIEW IN THE ADHESION CONTEXT

The availability of meaningful judicial review is particularly relevant to the issue of the enforceability of arbitration agreements contained in contracts of adhesion, especially in the context of nonexecutive or nonprofessional employees who are required, as a condition of employment, to agree to a broad arbitration provision which includes statutory employment discrimination claims. One of the criticisms of the arbitral process in this context is that arbitrators are not legally required to follow applicable law and, even if they attempt to do so, their decisions are not subject to substantive judicial review in the event they apply the law incorrectly. A recent case in the District of Columbia Circuit Court of Appeals, *Cole v. Burns International Security Services*⁴⁹ illustrates the confusion that exists as to the availability of meaningful judicial review of arbitral awards in this adhesion context.

The relevant issue in *Cole* was the enforceability of the pre-dispute arbitration agreement which plaintiff, a security guard, was required to sign as a condition of his employment and which clearly included statutory employment discrimination claims.⁵⁰ Plaintiff opposed the employer's motion to compel arbitration on the ground that "the arbitration agreement

⁴⁷ See Hayford & Peebles, *supra* note 42, at 405-406.

⁴⁸ See FED. R. CIV. P. 53(e).

⁴⁹ 105 F.3d 1465 (D.C. Cir. 1997).

⁵⁰ See *id.* at 1467.

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is unconscionable, because any arbitrator's rulings, even as to the meaning of public law under Title VII, will not be subject to judicial review.”⁵¹ The circuit court, in affirming the district court, held that the arbitration agreement was not unconscionable based on the circuit court’s assumption that “meaningful judicial review of public law issues is available” in the arbitral forum under the “manifest disregard of the law” standard.⁵² The court stated as follows:

The nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees’ statutory claims. In this context, the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law. Indeed, Burns has conceded such review in this case. Because the courts will always remain available to ensure that arbitrators properly interpret the dictates of public law, an agreement to arbitrate statutory claims of discrimination is not unconscionable or otherwise unenforceable.⁵³

Although recognizing that “manifest disregard of the law” has not been defined by the Supreme Court and that the circuit courts have adopted differing interpretations as to the meaning of this judicially created standard of review, the opinion of Chief Judge Edwards makes the leap of faith that, in the context of the arbitration of statutory claims, “judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”⁵⁴ Unfortunately, this conclusion by Chief Judge Edwards reflects what he (and many others, including this author) thinks the law *should be* in the context of mandatory arbitration of statutory employment discrimination claims rather than what the law *actually is* in that context.

The pre-dispute agreement signed by the employee in *Cole* made it clear that the agreement covered claims involving statutory antidiscrimination laws and that, by agreeing to have any future disputes resolved by arbitration, the employee would forfeit the right to a trial by jury.⁵⁵ The arbitration agreement also provided (in large type) that the employee “may wish to consult an attorney prior to signing this

⁵¹ *Id.* at 1486.

⁵² *Id.* at 1486–1487.

⁵³ *Id.* at 1468–1469.

⁵⁴ *Id.* at 1487.

⁵⁵ *See id.* at 1469.

agreement.”⁵⁶ Thus, Chief Judge Edwards did not find any other basis for believing that the pre-dispute arbitration agreement in this case was unconscionable, and he assumed that there would be meaningful judicial review to correct any errors of law which the arbitrators might make.⁵⁷ However, it is not clear that such an assumption is warranted.

Even in the context of employment discrimination claims, most federal courts have held that the fact that an arbitrator has misinterpreted or misapplied the law is not grounds for vacating an arbitral award, either under the manifest disregard standard or any of the other judicially created standards for overturning arbitral awards.⁵⁸ For example, the Second Circuit Court of Appeals recently held in *DiRussa v. Dean Witter Reynolds Inc.*⁵⁹ that an arbitration award in favor of an employee asserting an age discrimination claim should not be vacated or modified even though the award failed to include the statutorily required attorney’s fees. The court based its decision on the fact that there was no proof that the arbitrators actually knew of and intentionally disregarded the employee’s statutory right to attorney’s fees.⁶⁰ Although the employee argued that the Second Circuit should adopt a more stringent standard of judicial review than the manifest disregard standard when statutory employment rights are involved, the court refused to do so, noting that the employee failed to make that

⁵⁶ *Id.*

⁵⁷ *See id.* at 1487. However, Chief Judge Edwards did find that the provision in the AAA arbitration rules incorporated into the arbitration agreement, which requires that the arbitrator’s fees be shared equally by the parties unless the arbitrator specifies otherwise, would render the arbitration agreement unenforceable in this adhesion context. Thus, the court conditioned its order enforcing the employees agreement to arbitrate at the election of the employer on the employer’s agreement to pay the arbitrator’s fees, irrespective of the outcome of the case. Judge Karen Henderson dissented on this point, stating that the court had no authority to reform the arbitration agreement and that the court should either enforce the agreement as written or declare it unenforceable. *See id.* at 1488–1491. It is interesting to note that the court did not discuss the issue of whether the unilateral nature of the arbitration provision (i.e., that the employee was bound to arbitration whereas the employer could choose between arbitration or litigation) would render the arbitration agreement unconscionable and thus unenforceable in this adhesion context.

⁵⁸ *See generally* Michael P. O’Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 *FORDHAM L. REV.* 1121 (1995).

⁵⁹ No. 96-9068, 1997 U.S. App. LEXIS 20505 (2d Cir. Aug. 5, 1997).

⁶⁰ *See id.* at *10.

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argument to the district court.⁶¹ However, in *Chisolm v. Kidder, Peabody Asset Management, Inc.*,⁶² the court in a similar age discrimination case expressly declined “to create a second standard for manifest disregard when statutory claims are made” even though the employee argued to the district court that it should do so.⁶³

Judge Constance Baker Motley’s opinion in *Chisolm* referred to Chief Judge Edwards’ “thoughtful opinion in the *Cole* case advocating that the term manifest disregard be interpreted to involve more substantial judicial oversight in claims raised under the ADEA.”⁶⁴ Judge Motley, in refusing to follow Chief Judge Edwards’ suggestion, noted that a more stringent standard of judicial review for statutory claims might discourage those parties who considered finality an important aspect of arbitration from entering into arbitration agreements. However, even in the context of mandatory arbitration of employment discrimination claims, she was unable to conclude that it would be permissible to apply a heightened standard of judicial review “in light of the fact that there is nothing in the case law which could possibly support such a conclusion.”⁶⁵

Employers who seek to require their employees to agree to arbitration as a condition of employment may be well advised to include in their arbitration agreement a provision for judicial review to correct errors of law committed by the arbitrators, at least in the context of statutory claims. By so doing, they would eliminate one of the major criticisms of mandatory arbitration of statutory employment discrimination claims in this context.

VI. CONCLUSION

The beauty of arbitration is that it is a creature of contract. The parties can choose between arbitration that offers arbitral finality with no review (except to the limited extent provided by statute), or they can choose the other extreme, which is full judicial review as though the arbitral panel were a trial court. Instead of choosing one extreme or the other, a sensible middle ground might be to choose judicial review limited to correcting errors of law. This middle ground, which is illustrated in paragraph 2 of Appendix A and paragraph 3 of Appendix B, provides a mechanism to

⁶¹ See *id.* at *8–*9.

⁶² 966 F. Supp. 218 (S.D.N.Y. 1997).

⁶³ *Id.* at 226.

⁶⁴ *Id.*

⁶⁵ *Id.* at 227.

correct an arbitrator's legal error without burdening the parties with the costs and delay of a review process that might require a full review of a stenographic record of the arbitral proceeding. Whether the factual findings of the arbitrator are reviewed under the substantial evidence standard, the clearly erroneous standard or the arbitrary and capricious standard, the burdens of such a factual review may well outweigh its benefits. The broad scope of legal review suggested in these Appendices also avoids the uncertainty inherent in limiting the scope of the review to legal errors that are gross or substantial or which would result in a miscarriage of justice. Limiting judicial review of the arbitrator's conclusions of law by such a vague standard would create an additional level of uncertainty and would require a more subjective determination than is required where the usual judicial standard of legal error is applied. Moreover, if the goal of the parties is to obtain the same result that they would hope to obtain in court, it is not likely they would want to accept a legally incorrect award merely because the legal error is not gross or substantial.

With the possible exception of arbitration agreements that are imposed on the weaker party in the context of a contract of adhesion, parties to an arbitration agreement should not be required to subject arbitral awards to substantive judicial review unless they have expressly agreed to do so. Thus, arbitral finality should continue to be the default provision in the general arbitration statutes and standard rules governing commercial arbitration. However, if the parties elect to include provisions for judicial review to correct errors of law, it might be desirable for such provisions to be written into the statute or rules so that the specific terms governing the scope of such review can merely be incorporated by reference into the arbitration clause. As a practical matter, the lawyers drafting commercial agreements are usually unwilling to spend the time to negotiate the terms of an arbitration clause and the wording of provisions for judicial review because they often consider the possibility of future litigation too remote to worry about. The ability to obtain the safety net of judicial review to correct legal error merely by incorporating a standard judicial review provision by reference in the arbitration clause may avoid the need for the parties to negotiate the specific language of the judicial review provisions and thus encourage a greater use of pre-dispute arbitration agreements by those who would not agree to arbitration without this safety net.

The time to focus on the issue of judicial review of arbitral awards is at the contract drafting stage, before any dispute arises. The option of substantive judicial review, and the extent and scope of such review, should

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be considered by those who draft arbitration agreements, especially where the parties do not have equal bargaining power, as is the case where the arbitration agreement is required as a condition of employment.

APPENDIX A
ALTERNATIVE ARBITRATION CLAUSE WITH LIMITED
JUDICIAL REVIEW

1. Alternative to AAA Standard Arbitration Clause

Any controversy, claim or dispute of whatever nature [arising between the parties, including, but not limited to, those] arising out of or relating to this Agreement or the construction, interpretation, performance, breach, termination, enforceability or validity of hereof, whether such claim existed prior to or arises on or after the date of this Agreement, including the determination of the scope of this agreement to arbitrate, shall be determined by arbitration in _____ [city] by [one] [a panel of three] arbitrator[s] in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) and its Supplementary Procedures for Large, Complex Disputes, except that (a) every person named on all lists of potential arbitrators shall be a neutral and impartial lawyer with excellent academic and professional credentials (i) who has practiced law for at least [fifteen] years, specializing in either general commercial litigation or general corporate and commercial matters, [with experience in the field of _____] and (ii) who has had experience and is generally available to serve as an arbitrator and (b) each party shall be entitled to strike on a peremptory basis, for any reason or no reason, any or all of the names of potential arbitrators on any list submitted to the parties by the AAA, as well as any person selected by the AAA to serve as an arbitrator by administrative appointment. In the event the parties cannot agree on the selection of the arbitrator(s) from the one or more lists submitted by the AAA within thirty days after the AAA transmits to the parties its first list of potential arbitrators, the President of [the _____ Bar Association] shall nominate three persons for each vacancy in the arbitration panel who, in his or her opinion, meet the criteria set forth herein, which nominees may not include persons named on any list submitted by the AAA. Each party shall be entitled to strike one of such three nominees for each vacancy on a peremptory basis within ten days after its receipt of such list of nominees, indicating its order of preference with respect to the remaining nominees. The selection of the arbitrator shall be made by the AAA from the remaining nominees in accordance with the parties' mutual order of preference or by random

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selection in the absence of a mutual order of preference. The arbitrator(s) shall endeavor to base their award on applicable law and judicial precedent, shall include in such award the findings of fact and conclusions of law upon which the award is based and shall not grant any remedy or relief that a court could not grant under applicable law. The award shall be final and binding on all parties and shall not be vacated or modified (for errors of law or otherwise) except upon the grounds expressly provided in the Federal Arbitration Act. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

2. Provision for Limited Judicial Review of the Arbitration Award

Notwithstanding the foregoing, [in the event that the dispute submitted to arbitration is determined by one arbitrator, or by the unanimous decision of three arbitrators,] upon the application by either party to a court for an order confirming, modifying or vacating the award, the court shall have the power to review whether, as a matter of law based on the findings of fact determined by the arbitrator(s), the award should be confirmed, modified or vacated in order to correct any errors of law made by the arbitrator(s). In order to effectuate such judicial review limited to issues of law, the parties agree (and shall so stipulate to the court) that the findings of fact made by the arbitrator(s) shall be final and binding on the parties and shall serve as the facts to be submitted to and relied on by the court in determining the extent to which the award should be confirmed, modified or vacated.

3. Provision for Award of Costs and Attorney's Fees Against Party Breaching Arbitration Provisions

If either party fails to proceed with arbitration as provided herein, unsuccessfully seeks to stay such arbitration, fails to comply with any arbitration award or is unsuccessful in vacating or modifying the award pursuant to a petition or application for judicial review, such defaulting or unsuccessful party shall pay to the other party an amount equal to all costs, including reasonable attorney fees, paid or incurred by such other party in successfully compelling such arbitration or defending against the attempt to stay, vacate or modify such arbitration award and/or successfully defending or enforcing the award.

APPENDIX B
OTHER PROVISIONS PERMITTING APPELLATE REVIEW
OF ARBITRATION AWARDS

1. Right to Review by Appellate Arbitration Panel

(a) If either party is dissatisfied with (i) the decision or award rendered by a sole arbitrator or (ii) a less than unanimous decision or award rendered by a panel of three arbitrators, such dissatisfied party ("Appellant") may appeal the arbitrator's award to a panel of three appellate arbitrators by filing with the American Arbitration Association (AAA) and the other party ("Appellee"), within twenty days after transmittal of the award, a written brief, not to exceed twenty pages, stating the reasons why the arbitrator's decision should be reversed or modified. The Appellee shall file with the AAA and serve on the Appellant, within twenty days after receiving the Appellant's brief, an opposition brief, not to exceed twenty pages, which may include a cross-appeal, in which case Appellant shall be entitled to reply within ten days after its receipt thereof.

(b) The appellate arbitration panel shall consist of two lawyers having the qualifications and experience set forth in [Section __] hereof and one retired federal or state court judge of a court of record in the state in which the arbitration was held. The two lawyers shall be appointed in the same manner as provided in [Section __] hereof. If the parties cannot agree on a mutually acceptable retired judge to serve as the third appellate arbitrator, the President of [the _____ Bar Association] shall submit to both parties a list containing the names of three retired judges who, in his or her opinion, also meet the criteria set forth in [Section __] hereof. Each party shall be entitled to strike one of such three names on a peremptory basis, for any reason or no reason, indicating its order of preference with respect to the remaining names, and the selection of the third appellate arbitrator shall be made from among such name(s) that have not been so stricken by either party in accordance with their designated order of mutual preference.

(c) Either party may request oral argument before the appellate panel, which, if requested, should be conducted within thirty days following the selection of the appellate panel. The appellate arbitration shall be based only on the record of the initial hearing, appellate briefs and oral argument, if any. The appellate arbitrators shall render a written decision, signed by a majority of such arbitrators, affirming, reversing, modifying or remanding the arbitrator's decision and award within thirty days after receiving the

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final appellate submissions. The appellate arbitrators may reverse or modify the arbitrator's decision and award or remand the matter for further proceedings by the arbitrator, on any of the following grounds:

(i) Any ground specified in Sections 10 and 11 of the Federal Arbitration Act;

(ii) The arbitrator committed prejudicial error by erroneously applying the law to the issues and facts presented for resolution of the dispute or there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;

(iii) Material failure of the arbitrator, the administrator or the Appellee to follow the procedures set forth in this Agreement unless the Appellant continued the arbitration proceeding with notice of such failure and without objection; or

(iv) The arbitrator's award is arbitrary, capricious or clearly erroneous.

(d) The appellate panel may render a final decision on appeal or remand the matter for further proceedings by the arbitrator. The decision of the appellate panel shall be final and binding on the parties and shall not be subject to judicial review except to the extent otherwise provided in Sections 10 or 11 of the FAA.

(e) [See paragraph 5 below imposing costs and attorney's fees on an unsuccessful Appellant.]

2. Right to Full Judicial Review

The arbitrator(s) shall set forth in writing their findings of fact and conclusions of law and shall render their award based thereon. Upon application by either party to a court for an order confirming, modifying or vacating the award, the court shall have the power to review (a) whether the findings of fact rendered by the arbitrator(s) are supported by substantial evidence and (b) whether, as a matter of law based on such findings of fact, the award should be confirmed, modified or vacated. Upon such determination, judgment shall be entered in favor of either party consistent herewith.

3. Right to Limited Judicial Review Under State Law Based on Facts Found by the Arbitrator

(a) The arbitrator(s) shall set forth in writing their findings of fact and conclusions of law and shall render their award based thereon. No party shall seek a confirmation of the arbitral award until at least thirty days have elapsed from the delivery of said award to the party or parties seeking confirmation. Any petition or other request for confirmation prior to such date, or during the pendency of an action on submitted facts pursuant to the statute referred to in paragraph (b) hereof, shall be stayed and this paragraph shall be deemed as consent to such stay by all parties to this Agreement.

(b) Either party may seek judicial review of the arbitrator(s)' award by commencing an action on submitted facts under [Section __] of the statutes of the [State of _____] within twenty days after its receipt of the arbitral award. The findings of fact rendered by the arbitrator(s) shall serve as the submission of facts required pursuant to such section. Upon the court's determination of such action and its rendering a judgment or order thereon, the decision and award of the arbitrator(s) shall be rendered null and void and of no further force or effect, and such judgment of the court shall be reviewable in the same manner as any other order, decision or judgment of a judge of the [_____ Court] of the [State of _____].

4. Right to More Complete Judicial Review Under Federal Rules as Though the Arbitrator Acted as a Special Master

(a) A party who desires to appeal the arbitrator(s)' award (Appellant) shall give notice of its intent to appeal to the other party (Appellee) no later than twenty days after the arbitrator's award is rendered. The appellee may in turn give notice to the Appellant of the Appellee's desired venue for the appeal no later than ten days after receipt of the Appellant's notice of intent to appeal.

(b) An Appellant who has complied with the notice provisions above may appeal the award by filing an action for affirmative or declaratory relief concerning the subject matter of the arbitration, but for no other relief, in a court having general trial jurisdiction that includes the matter in controversy. If such a court exists within a venue specified by the appellee pursuant to the previous paragraph, the action shall be filed in that venue.

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Such an action shall be filed no later than forty-five days after the arbitrator's award is rendered.

(c) The Appellee may counterclaim for enforcement of the award. Alternatively, the Appellee may cross-appeal by counterclaiming for affirmative or declaratory relief concerning the subject matter of the arbitration, but for no other relief.

(d) An award from which an appeal permitted by this Agreement is timely taken shall not be a binding award, but nevertheless shall be filed with the court as follows:

(i) The parties agree that the arbitrator shall set forth in writing the findings of fact and conclusions of law upon which the award is based and that such findings and conclusions shall be filed with the court as the report of a special master in the manner and with the effect prescribed by Rule 53(e) of the Federal Rules of Civil Procedure. The findings of fact shall not be final but shall be subject to review under the "clearly erroneous" standard as prescribed by Rule 53(e)(2) and (4) of the Federal Rules of Civil Procedure.

(ii) The parties agree that the record in the arbitration hearing shall automatically become the agreed record in the action, subject to re-opening before the same arbitration panel only in accordance with the principles governing new trials to the court under Rule 59 of the Federal Rules of Civil Procedure.

(iii) If the action is filed in a state court or other forum other than a United States district court, the parties agree that the stipulations in this subsection shall nevertheless apply in the same manner as if the action had been filed in a United States district court.

(e) The running of any statute of limitations applicable to a claim or counterclaim made in the arbitration proceeding shall be tolled during the arbitration proceeding to the extent that the claim or counterclaim was not barred by time limitations when made.

(f) If an award is appealable under this Section and an appeal is not timely made in accordance with the procedures of this Section, then the award shall automatically become final and binding as between the parties and nonappealable for any reason. The award may thereafter be confirmed or enforced by either party in any court of competent jurisdiction by the filing of an appropriate action. Each party shall be deemed to have conclusively waived any and all defenses against enforcement that could have been made in an appeal pursuant to this Section, including any and all defenses that would otherwise be available under the FAA.

5. Optional Provision Regarding Shifting Costs of Appeal

If the Appellant is unsuccessful in vacating or modifying the arbitrator's award pursuant to the foregoing appellate procedure, or if Appellant succeeds in modifying the award with respect to the amount of money payable to or by Appellant but such modification does not increase the amount payable to, or decrease the amount payable by, Appellant by at least ten percent of the amount awarded by the arbitrator, then Appellant shall bear one-hundred percent of the costs of the appeal and shall reimburse the Appellee for its reasonable attorney's fees, costs and disbursements incurred by Appellee in defending the appeal. The Appellee shall not be required to reimburse Appellant for any of its costs, expenses or attorney's fees (even if Appellant is successful in such appeal) except to the extent otherwise provided by applicable law or the provisions of this Agreement.